Supreme Court, U.S.
FILED
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No. 99-

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

EDWARD HALYE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Pennsylvania Superior and Supreme Courts err in striking as violative of the Fourteenth Amendment to the United States Constitution those sections of Pennsylvania's Title 42 referring to the designation of a "sexually violent predator"?

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The order and majority opinion of the Superior Court of Pennsylvania reversing the Judgment of Sentence from the Court of Common Pleas of Luzerne County is reported at *Commonwealth v. Halye*, 719 A.2d 763 (Pa. Super. 1998), and is reprinted in Appendix A, together with the concurring opinion by Judge Orie Melvin, the concurring opinion by President Judge McEwen, the concurring and dissenting opinion by Judge Ford Elliott, and the concurring and dissenting opinion by Judge Joyce. The opinion of Judge Patrick J. Toole of the Court of Common Pleas of Luzerne County in support of the judgment of sentence is reprinted in Appendix B.

The sentencing order of the Court of Common Pleas of Luzerne County is unreported and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The order of the Supreme Court of Pennsylvania denying discretionary review was dated September 9, 1999 and entered on September 10, 1999. (App. D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor any to any person within its jurisdiction the equal protection of the laws.

42 Pa. C.S.A. § 9794, the text of which can be found in Appendix E.

STATEMENT OF THE CASE

Respondent, Edward Halye, was convicted by a jury of two counts of involuntary deviate sexual intercourse, two counts of indecent assault, one count of corruption of minors, and one count of endangering the welfare of children. The trial court subsequently directed the Sexual Offender's Assessment Board to perform an assessment of Respondent in accordance with 42 Pa. C.S.A. § 9791 *et seq*. ("Megan's Law").

After the verdict, the trial court entered an order directing the Sexual Offenders Board to examine Respondent, in accordance with 42 Pa. C.S.A. § 9791 *et seq*. (hereinafter "Megan's Law"). The Board found that Respondent fit the profile of a sexually violent predator. The trial court held an evidentiary hearing, and determined that Respondent was a sexually violent predator. The court subsequently sentenced Respondent to a term of incarceration of one hundred thirty-eight (138) months to life.

Respondent appealed to the Superior Court of Pennsylvania, raising a number of constitutional challenges to Megan's Law.

The Superior Court vacated Respondent's judgment of sentence. *Commonwealth v. Halye*, 719 A.2d 763 (Pa. Super. 1998). The Superior Court found that the provisions of Megan's Law which require a defendant to rebut a presumption, and which do not impose on the Commonwealth a burden of persuasion by clear and convincing evidence, violate the due process clause of the federal constitution. The Court struck as unconstitutional all of the sections of Megan's Law which refer to the designation of a "sexually violent predator."

The Commonwealth subsequently sought discretionary review in the Supreme Court of Pennsylvania. The Supreme Court denied the Petition by order dated September 9, 1999. The Pennsylvania Supreme Court subsequently decided the case of *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999). In *Williams*, the Supreme Court agreed with the Superior Court's judgment in *Halye*, and held that the procedure for determining whether a fender is a sexually violent predator under Megan's Law violated the procedural due process protections of the United States Constitution.

The Commonwealth of Pennsylvania now seeks review of the federal issues raised in the instant case by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The instant case stems from the decisions of the Pennsylvania Superior and Supreme Courts which struck 42 Pa. C.S.A. § 9794, and all other sections of Pennsylvania law that referred to the designation of "sexually violent predator", as unconstitutional. The Pennsylvania courts have held that the provisions that require a defendant to rebut the

presumption that he is a sexually violent predator, and that do not instead impose on the Commonwealth a burden of persuasion by clear and convincing evidence, violate the due process clause of the Federal Constitution.

The Petitioner maintains that the issue in the instant case raises an important question of federal law that has not been, but should be, settled by this Court. At least forty-nine (49) states have passed similar legislation with regard to sentencing and\or notification with regard to sexual offenders. *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3rd Cir. 1997). The issues involved in this in similar cases have a tremendous impact on the protection of the public and the states' abilities to set forth penal laws governing the types of criminal conduct at issue in this case. This Court must provide the states with guidance as to the limits of their abilities to punish offenders in this regard and to protect the public. It is imperative that the limits of the Fourteenth Amendment in this regard be clearly delineated by this Court.

Furthermore, the Petitioner maintains that the state courts of Pennsylvania have decided this vital federal issue in a way that conflicts with relevant decisions of this Court. Petitioner maintains that the laws reversed in this case do not violate federal guarantees of procedural due process. Under Megan's Law, an individual convicted of one of the offenses enumerated in 42 Pa. C.S.A. § 9793(b) is presumed to be a sexually violent predator, and the offender has the burden of proving by clear and convincing evidence that he or she should not be assessed as a sexually violent predator. 42 Pa. C.S.A. § 9794(b).

This statute is not unique in Pennsylvania jurisprudence for imposing a sentencing presumption as the result of a

conviction. *See* 42 Pa. C.S.A. § 9714(b) ("Presumption of high risk dangerous offender"). Further, unlike presumptions struck down for improperly permitting a fact finder to improperly infer an element of an offense beyond a reasonable doubt, the presumption at issue herein does not go before the fact finder at the guilt phase of a trial, and the Commonwealth's burden to prove all the elements of the enumerated offenses is not lessened in any manner. "[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *County Court of Ulster County v. Allen*, 99 S. Ct. 2213 (1979).

> The function of a standard of proof as that concept is embodied in the Due Process Clause and in the realm of fact finding, is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Cooper v. Oklahoma, 116 S. Ct. 1373, 1381 (1996) (citations omitted). There is nothing irrational or arbitrary about presuming that an individual who has already violently violated the privacy and well-being of another individual, and the community's sense of security, is likely to engage in similar behavior in the future. *United States v. Salerno*, 107 S. Ct. 2095 (1987). There is nothing inherently unattainable about a prediction of future criminal conduct. *Id.* at 2103-2104.

Despite the propriety of this presumption, however, Megan's Law adds protection for a defendant by providing

for an assessment by the Board and court review of that assessment. A defendant is thus given a viable avenue to dispel the presumption.

In the present case, the Respondent's guilt has already been established beyond a reasonable doubt. "Decisions made in sentencing do not as deeply implicate a defendant's rights as do decisions made regarding guilt or innocence. Once criminal proceedings reach the sentencing stage, the decision has already been made that the defendant can be deprived of his liberty." *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989).

> Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation. . . ."

Speiser v. Randall, 78 S. Ct. 1332, 1341 (1958). Respondent, at the assessment hearing, attempted to avoid the mandatory maximum sentence. Under such circumstances the shifting of the burden to a defendant is proper:

> It therefore logically follows that the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence. Thus, when the Government attempts to upwardly adjust the sentence, it must bear the burden of persuasion. This prevents the criminal defendant from having to "prove the negative" in order to avoid a stiffer sentence. . . . Conversely, when the defendant is attempting to justify a downward departure, it is usually the defendant who bears the burden of

> persuasion. . . . This is simply an extension of our pre-guidelines analysis in *United States v. Garcia*, 544 F.2d 681 (3d. Cir. 1976), in which we held that "[o]ne who affirmatively seeks special favor at sentencing has the burden of proving why it should be bestowed."

United States v. McDowell, 888 F.2d at 291; *See also Medina v. California*, 112 S. Ct. 2572 (1992) (no constitutional violation in requiring a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence); *Leland v. Oregon*, 72 S. Ct. 1002 (1952) (state statute requiring a defendant to prove insanity beyond a reasonable doubt was not violative of Due Process as state was still required to prove every element of the offense beyond a reasonable doubt); *Williams v. People of the State of New York*, 69 S. Ct. 1079, 1085 (1949) ("The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts — state and federal — from making progressive efforts to improve the administration of criminal justice.").

CONCLUSION

The Pennsylvania courts have decided cases that raise an important federal question that has not been settled by this Court, and have done so in a way that conflicts with relevant decisions of this Court. Accordingly, public policy mandates the grant of the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — REVISED MAJORITY OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED OCTOBER 6, 1998

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2183 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EDWARD JAMES HALYE,

Appellant.

Appeal from the Judgment of Sentence entered May 6, 1997 in the Court of Common Pleas of Luzerne County, Criminal, No. 2850 of 1996.

BEFORE: McEWEN, P.J., DEL SOLE, KELLY, POPOVICH, FORD ELLIOTT, JOYCE, MUSMANNO, ORIE MELVIN, and SCHILLER, JJ.

OPINION BY DEL SOLE, J.:

Following a jury trial, Appellant was convicted of two counts of involuntary deviate sexual intercourse, two counts of indecent assault, one count of corruption of minors and one count of endangering the welfare of children. Thereafter, the trial court initiated procedures to determine whether to classify Appellant as a "sexually violent predator," under

the Registration of Sexual Offenders Act, 42 Pa.C.S.A. § 9791 – 9799.6 [the Act.] Following a report by the Sexual Offenders Assessment Board and a hearing, the court held that Appellant did not rebut the Act's presumption and, therefore, he was a "sexually violent predator." At sentencing the court also found Appellant was a "high risk dangerous offender" under 42 Pa.C.S.A. § 9714[1]. In accordance with the mandatory minimum sentencing requirements of § 9714 and the mandatory maximum sentencing requirement of a life sentence under the Act, 42 Pa.C.S.A. § 9799.4, Appellant was directed to serve an aggregate term of imprisonment of 138 months to life. Appellant filed a post-sentencing motion challenging the constitutionality of the Act. The court denied it and this appeal followed. Finding merit in two of Appellant's claims, we vacate his sentence and remand for resentencing.

The questions presented for our review are whether the evidence is sufficient to sustain Appellant's conviction for endangering the welfare of children and whether the Act is constitutional. The constitutional challenge made by Appellant is based on a number of specific attacks on provisions of the Act, which are alleged to be violative of the Pennsylvania and United States Constitutions.[2] Because

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1. Appellant makes no challenge in this appeal to his classification as a "high risk dangerous offender" or to the mandatory sentencing provisions applicable to this classification, therefore such matters will not be considered in this appeal.

2. Appellant lists the following constitutional challenges: 1.) whether the adjudication and notification requirements of the Act

(Cont'd)

we conclude that the Act improperly places the burden of persuasion on a defendant in violation of federal procedural due process and is, therefore, unconstitutional, we need not examine the other constitutional questions raised by Appellant.

Before turning to Appellant's constitutional question, we will address his concern that the evidence presented by the Commonwealth was insufficient to sustain his conviction for endangering the welfare of children. The elements of this criminal offense are set forth in 18 Pa.C.S.A. § 4304, which provides:

> **Offense defined.** — A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

Appellant specifically alleges that he was not the parent or guardian of the child-victim and the Commonwealth did

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(Cont'd)
violate the double jeopardy clauses of the Pennsylvania and United States Constitution; 2.) whether the Act violates substantive due process; 3.) whether the sexually violent predator provisions are unconstitutionally vague; 4.) whether the sexually violent predator provisions subject defendants to cruel and unusual punishment prohibited by the state and federal constitutions; 5.) whether the Act violates procedural due process because it fails to afford the defendant any opportunity to be heard and because it imposes the burden of persuasion on the defendant; and 6.) whether the notification requirements of the Act violate state and federal rights to privacy.

not establish that he was supervising the welfare of the child at the time of the assault. In reviewing a sufficiency of the evidence claim, we view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth. ***Commonwealth v. Rose***, 463 Pa. 264, 344 A.2d 824 (1975). A mere conflict in the testimony does not render the evidence insufficient, ***Commonwealth v. Verdekal***, 506 A.2d 415 (Pa.Super. 1986), because it is within the province of the fact finder to determine the weight to be given to the testimony and to believe all, part, or none of the evidence. ***Commonwealth v. Whitfield***, 475 Pa. 297, 380 A.2d 362 (1977).

At trial the victim's mother testified that Appellant, who was her second or third cousin, had come to her home with her former mother-in-law for a visit. The witness stated that her husband, her son and her daughter were also at home that evening. The children were playing in a bedroom while the adults were in another part of the home. At one point, Appellant indicated that he had to go to the bathroom. When he did not promptly return, and the children became quiet, the mother testified that she became concerned and walked back to the bedroom to check on them. Her daughter was seen sitting on the edge of the bed playing a game by herself. Upon opening a closet door, Appellant was discovered with his head placed near her son's exposed privates.

Despite the criminal nature of Appellant's actions, which support his convictions for involuntary deviate sexual intercourse, indecent assault and corruption of minors, there is insufficient evidence of Appellant's role as a supervisor or guardian of the child to support the endangering the

welfare of children conviction. No testimony was presented to indicate that Appellant was asked to supervise the children or that such a role was expected of him. Rather, Appellant was a visitor in the child's home. The child's parents were home and were supervising their children. This is evidenced by the mother's remarks that her concern for the children led her to check on them and to discover the assault by Appellant.

There is insufficient evidence to sustain a conviction for child endangerment where the Commonwealth fails to prove any statutory element. ***Commonwealth v. Pahel***, 689 A.2d 963 (Pa.Super.1997). In this matter, viewing the evidence in the light most favorable to the Commonwealth, we conclude that it failed in its burden of proving that Appellant was in the position of supervising the children at the time of the assault. Accordingly we reverse Appellant's conviction for endangering the welfare of children.

Appellant's conviction on the charges of involuntary deviate sexual intercourse and indecent assault led to the court's initiation of procedures to determine if Appellant was a "violent sexual predator." The court's ultimate finding and imposition of sentence, which included a mandatory maximum term of life imprisonment under the Act, caused Appellant to question its constitutionality. Among the claims made is that the Act improperly shifts the burden of persuasion to the defendant, in violation of federal procedural due process rights.

The Act, often referred to as Pennsylvania's Megan's Law, contains certain registration and notification provisions,

as well as the mandatory maximum sentencing requirement, for those deemed violent sexual predators. Individuals convicted of certain specified sexually violent offenses are to be assessed by a state board composed of psychiatrists, psychologists and criminal justice experts, after conviction, but before sentencing. 42 Pa.C.S.A. § 9794(a) and § 9799.3. The Act declares that a presumption shall be applied in making this assessment. It specifically states:

> An offender convicted of any offense set forth in section 9793(b) [listing certain sexually violent offenses] shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S.A. § 9794(b).

Subsection (e) carries the presumption to the hearing stage of the proceeding. Within 60 days from the date of conviction, the board is required to submit a report to the court. 42 Pa.C.S.A. § 9794(d). Upon receipt of the report, and prior to sentencing, the court is directed to hold a hearing to determine if the offender is a sexually violent predator. 42 Pa.C.S.A. § 9794(e). After review of all the evidence presented at the hearing the court is to decide whether the presumption has been rebutted. ***Id.***

Those not classified as "sexually violent predators" are required to register with the state police upon their release. The information gathered is then provided to the chief law

enforcement officer of the police department of the municipality in which the offender will reside. 42 Pa.C.S.A. § 9793.

Those classified by the court as "sexually violent predators" are subject to certain registration and notification requirements under the Act which are much broader in scope than the registration and notification requirements applied to sex offenders who are not given this classification. 42 Pa.C.S.A. §§ 9795, 9797 and 9798. In addition, sexually violent predators are subject to a mandatory maximum sentence of life under 42 Pa.C.S.A. § 9799.4(a), mandatory counseling under § 9799.4(b), and mandatory life imprisonment if subsequently convicted of a sexually violent offense under § 9799.4(c). Thus, there is a discernable difference between those who are sex offenders and those classified by the court as "sexually violent predators." ***Van Doren v. Mazurkiewicz***, 695 A.2d 967 (Pa. Cmwlth. 1997).

This Court has had occasion to consider the constitutional validity of the registration provisions of the Act. ***Commonwealth v. Mountain***, No. 836 Pittsburgh 1997 (Pa.Super. filed April 3, 1998). In ***Mountain***, the sentencing court agreed with the report of the state board that the appellant did not fit the profile of a sexually violent predator, but nevertheless he remained subject to the registration procedures applicable to sexual offenders. The appellant challenged these procedures arguing that he was deprived of both federal and state procedural due process when a hearing was not held prior to the imposition of the registration requirements. We rejected the claim noting that this Court, in ***Commonwealth v. Gaffney***, 702 A.2d 565 (Pa. Super.

1997), held that the registration provisions of the Act are non-punitive. The panel in ***Mountain*** ruled that absent the deprivation of a liberty or property interest, a substantive or procedural due process claim will not survive. ***Mountain***, slip opinion at 10.

In ***Gaffney*** a panel of this Court rejected a constitutional challenge to the Act which alleged that it violated the *ex post facto* clauses of the United States and Pennsylvania Constitutions. ***Gaffney***, 702 A.2d 565. In dismissing this claim, the panel relied heavily on the decisions of two United States Third Circuit cases, ***Artway v. Attorney General***, 81 F.3d 1235 (3d Cir. 1996), and ***E.B. v. Verniero***, 119 F.3d 1077 (3d Cir. 1997). In those decisions the courts were reviewing constitutional challenges to New Jersey's Megan's Law. The ***Gaffney*** court utilized a three-prong test formulated by the circuit court decisions to determine whether a legislative enactment qualifies as a punishment. It considered whether: "(1) the legislature's actual purpose is punishment, (2) the 'objective' purpose is punishment, or (3) the effect of the statute is so harsh that 'as a matter of degree' it constitutes punishment." ***Gaffney*** 702 A.2d at 567.

The ***Gaffney*** court noted that this comprehensive test was applied by the Third Circuit in ***Artway***, which concluded that the registration provisions in the New Jersey version of Megan's Law were not punishment and therefore *the ex post facto* clause of the United States Constitution was not violated. ***Id.*** While remarking that these federal decisions are not binding upon this Court, the ***Gaffney*** court ruled that it is appropriate for this Court to follow these Third Circuit decisions absent a ruling by the United States Supreme Court.

Id. Accordingly it held that given the substantive identity of the Pennsylvania and New Jersey statutes, and absent evidence that the effects of the two statutes differ, the registration provisions do not violate the *ex post facto* Clause of the United States Constitution.

A like result was achieved by the Commonwealth Court in ***Van Doren v. Mazurkiewicz***, 695 A.2d 967 (Pa.Cmwlth. 1997). Therein the appellant claimed that the registration provisions of the Act constitute additional punishment and therefore violate the double jeopardy and *ex post facto* clauses of the United States Constitution. The court noted that the Third Circuit Court in ***Artway*** rejected this same challenge and that the analysis set forth by the Third Circuit compelled a similar conclusion in its case with respect to Pennsylvania's version of Megan's Law. ***Id.*** at 975.

The question we address in this case concerns not the registration requirements, but rather the presumption imposed on those undergoing evaluation and characterization by a board and a court when considering whether to classify an offender as a "sexually violent predator." The specific claim is that these provisions violate the procedural due process protections of the United States Constitution. However, much like the courts in ***Mountain, Gaffney*** and ***Van Doren***, which relied on the Third Circuit Court decisions concerning the *ex post facto* claims, we too have the benefit of the Third Circuit Court's ruling on the procedural due process issue.

In ***E.B. v. Verniero***, 119 F.3d 1077 (1997), a procedural due process claim was made in addition to *ex post facto* and

double jeopardy claims. The appellants in ***Verniero*** claimed due process requires that the state rather than the registrant carry the burden of persuasion at a Megan's Law hearing and that the state demonstrate the propriety of the classification by clear and convincing evidence. ***Id.*** at 1106.

The ***Verniero*** court recognized that the appellants' claim of entitlement to procedural due process falls under the provision of the Fourteenth Amendment of the United States Constitution, which provides that "no person shall be deprived of life, liberty or property without due process of law." U.S. Const. Amend. XIV. The court noted that the appellants had a liberty interest granted by state law of which they could not be deprived without being accorded the process due under the Fourteenth Amendment. ***Verniero*** at 1105. In considering what process is due, and whether a shift in the burden of persuasion can be tolerated, the court considered three distinct factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such an interest through the procedures used; and (3) the value of the government's interest, including the function involved and the burdens that an additional or substitute procedural requirement would entail. ***Id.*** at 1106 (*citing* ***Mathews v. Eldridge***, 424 U.S. 319, 334-335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976)).

The court first considered the private and public interest involved with the state's notification procedure for those classified as moderate (Tier 2) or high (Tier 3) risks. The notifications involved with a Tier 2 registrant under the New Jersey law includes " 'law enforcement, school and community organization alert,' issue[d] to registered schools,

day care centers, summer camps, and other community organizations which care for children or provide support to women and where individuals are likely to encounter the sex offender." ***Id.*** at 1082 (*citing* N.J.S.A. 2C:7-8c(2)). Tier 3 registrants are subject to community notification in which members of the public who are likely to encounter the registrant are notified. ***Id.***

The court found that under this system the private interest affected by the notification system is very substantial for it "puts the registrant's livelihood, domestic tranquility and personal relationships with all around him in grave jeopardy." ***Id.*** at 1107. It further noted the state has a compelling interest in protecting its citizens by giving prompt notifications to those who may potentially be harmed, while at the same time it has an interest in ensuring that its classification and notification system is fair and accurate. ***Id.*** After examining these competing interests the court concluded that the burden of proof must remain with the state if the risk of error will be materially reduced without materially impairing the state's ability to secure a prompt determination and without the imposition of substantial new administrative burdens. ***Id.***

In assessing the risk of error, the ***Verniero*** court observed the fact-finding function involved is made difficult because sex crimes generally have a limited number of witnesses which creates the need for credibility determinations. ***Id.*** at 1108. Further, the issues are resolved in a proceeding in which the rules of evidence are not applied and the proceedings have a strict timetable. Thus, it reasoned that the assignment of the burden of persuasion to the prosecutor will substantially reduce the risk of an erroneous outcome. ***Id.***

Finally it considered whether an allocation of the burden of persuasion to the state would materially impair the state's ability to receive a prompt determination or impose new administrative burdens on it. ***Id.*** After concluding there was an absence of any substantial economic or other burden to the state, it ruled that due process requires that the prosecutor shoulder the burden of persuasion. ***Id.*** at 1109.

The ***Verniero*** court's rationale can be readily applied when considering Appellant's constitutional challenge to the Act. Although the Act differs in many respects from the New Jersey version of Megan's Law, the differences only create further support for the conclusion that it is appropriate for the burden of persuasion to be with the prosecution. Like the New Jersey statute, the Pennsylvania Act and its notification procedures for those classified as sexually violent predators, impacts significantly on the registrant's ability to maintain a private life.

The Act directs that the chief law enforcement officer in the municipality which the predator resides create a notice which includes the offender's name, his classification as a sexually violent predator, his address, the offense for which he was convicted, and a picture, if available. 42 Pa.C.S.A. § 9798(a). It is to be distributed to neighbors, the director of the children and youth service agency in the county, the superintendent of schools in the area, the director of each licensed day care and preschool program, and the president of any nearby college or university. 42 Pa.C.S.A. § 9798(b). Furthermore the Act has a significant impact on the offender's freedom as a result of its mandatory maximum sentencing requirement of life imprisonment. 42 Pa.C.S.A § 9799.4(a).

Like the ***Verniero*** court, in assessing the potential risk of error, we must look to the procedure utilized in determining whether an offender is a sexually violent predator and, therefore, subject to the registration, notification and mandatory sentencing requirements of the Act. This is a fact-finding function made after an initial assessment of a board. As with the New Jersey statute, time restraints are involved since the board's assessment must be made no later than 60 days from the date of the offender's conviction. 42 Pa.C.S.A § 9794(d). The board is asked to consider factual matters such as the offender's age, and prior record and the victim's age, but it is also required to determine whether the offender displayed "unusual cruelty" and whether there was a "pattern of abuse." 42 Pa.C.S.A. § 9794(c). Thus, a subjective decision about the offender's dangerous nature must necessarily be made. And, although the offender has a right to call witnesses and cross-examine witnesses, the rules and procedure followed in a trial do not apply. Thus the concern identified in ***Verniero***, of materially reducing the risk of error by placing the burden of persuasion with the prosecutor, is equally at issue here.

Finally, we perceive no material impairment on the state's ability to secure a prompt determination by requiring it to shoulder the burden of persuasion. Thus, following the lead of the Third Circuit Court in ***Verniero***, we too find due process requires that the prosecution carry the burden of persuasion.

The Third Circuit has carefully weighed this exact question as it applies to the New Jersey statute. While its decision is not binding, we find it is appropriate for this Court

to follow its ruling in view of the like purposes and requirements of the Acts. In fact, the effect of the Pennsylvania Act is more severe since it imposes even more restrictions on an offender's liberty with its maximum mandatory life imprisonment provisions. We therefore hold that the Act's provisions which require an offender to rebut a presumption which arises if the offender has been convicted of certain enumerated crimes, violates the Fourteenth Amendment to the United States Constitution.

Following the lead of the court in ***Verniero*** we also find that due process requires the prosecution to prove the facts by clear and convincing evidence, rather than merely by a preponderance of the evidence. As the Third Circuit stated:

> Because 'the possible injury to the individual [registrant] is significantly greater then any possible harm to the state,' the registrant, consistent with due process, cannot 'be asked to share equally with society the risk of error. [Addington v. Texas, 441 U.S. 418, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979)] 441 U.S. at 427. It necessarily follows that the Due Process Clause requires that the state prove its case by clear and convincing evidence in a Megan's Law proceeding.

Verniero, 119 F.3d at 1077.

This high standard of proof is constitutionally required where, as here, the designation of one as a "sexually violent predator" is separate and distinct from both the trial and

sentencing and entails a fact-finding function. As noted, the designation has severe results and this measure of due process must be afforded an offender to protect against erroneous outcomes.

For these reasons we conclude that the due process clause of the federal constitution is violated by the provisions of the Act which requires the offender to rebut a presumption and which do not impose upon the prosecution the burden of persuasion by clear and convincing evidence. As a consequence, we strike as unconstitutional § 9794 of Title 42 and all remaining sections of the Act which refer to the designation of a "sexually violent predator." Accordingly, we reverse Appellant's conviction for endangering the welfare of children and we vacate the judgment of sentence on Appellant's remaining convictions and remand for resentencing absent application of the provisions of the Act.

McEwen, P.J., files a Concurring Statement
Ford Elliott, J. files a Concurring and Dissenting Opinion
Joyce, J. files a Concurring and Dissenting Opinion
Orie Melvin, J. Concurring Opinion

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2183 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EDWARD JAMES HALYE,

Appellant.

Appeal from the Judgment of Sentence May 6, 1997
in the Court of Common Pleas of Luzerne County,
Criminal, No. 2850 of 1996.

BEFORE: McEWEN, P.J., DEL SOLE, KELLY, POPOVICH, FORD ELLIOTT, JOYCE, MUSMANNO, ORIE MELVIN, and SCHILLER, JJ.

CONCURRING STATEMENT BY McEWEN, P.J.:

Sexual abuse and violence poses so critical a challenge to the well being of our American society as to equal the drug plague. Once again, in opinions proffered by the authors of the majority position and of the concurring and dissenting views, this Court achieves admirably, for one finds in those expressions such insightful jurisprudential perspectives as will enable the Pennsylvania Supreme Court — and, perhaps,

once again, require the Legislature — to address this perverse violation of the sanctity of the person.

The Legislature and the Executive have in the Sexual Offenders Act declared a particular abhorrence of these crimes. The majority and concurring expressions find such crimes no less repugnant as each concludes that the Act falls short of constitutional compliance. The dissent urges that the Act has attained constitutionality and thereby concludes that trial judges may presently rely upon the present act for the imposition of the severe sentences of which sex offenders are so worthy.

Thus, amid all the dialogue upon constitutionality, a stark unanimity of conclusion pervades this Court, and its colleagues in the other branches, namely, that the violent sexual abuser and offender must be severely punished and subjected to prolonged confinement. As a result, it may not be doubted that should our Supreme Court view the present Act as of unconstitutional hue, the Legislature will assuredly move promptly to remedy any constitutional infirmity.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2183 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA

v.

EDWARD JAMES HALYE,

Appellant

Appeal from the Judgment of Sentence, May 6, 1997
in the Court of Common Pleas of Luzerne County
Criminal Division, No. 2850 OF 1996

BEFORE: McEWEN, P.J., DEL SOLE, KELLY, POPOVICH, FORD ELLIOTT, JOYCE, ORIE MELVIN, MUSMANNO and SCHILLER, JJ.

CONCURRING AND DISSENTING OPINION BY FORD ELLIOTT, J.:

I join in that part of the majority's opinion which vacates appellant's conviction for endangering the welfare of children. However, I respectfully dissent from the majority's determination that 42 Pa.C.S.A. § 9794 is unconstitutional.

Initially, I too thought that the rebuttable presumption imposed upon appellant pursuant to § 9794(b) had serious due process implications. However, I am now firmly

convinced that the Pennsylvania Act, a subchapter of the Sentencing Code, satisfies due process. "Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded 'the entire panoply of criminal trial procedural rights.' " ***Commonwealth v. Wright***, 508 Pa. 25, __, 494 A.2d 354, 359-360 (1985), *affirmed sub nom.* ***McMillan v. Pennsylvania***, 477 U.S. 79 (1986), quoting ***Gardner v. Florida***, 430 U.S. 349, 358 n.9 (1977). It has always been "the province of the legislature to determine the punishment . . . for criminal conduct." ***Wright***, *supra* at __, 494 at 361 (citation omitted). Moreover, it is normally within the legislature's power to assign burdens of production and persuasion in criminal matters, so long as its decision does not offend fundamental principles of justice. ***McMillan***, 477 U.S. at 85.

Under the provisions of § 9794,[1] the status of an offender as a sexually violent predator occurs after the defendant's

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1. The relevant provisions of § 9794 are as follows:

§ 9794. Designation of sexually violent predators

(a) Order for assessment. — After conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the board. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.

(b) Presumption. — An offender convicted of any offense set forth in section 9793(b) shall be

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presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

(c) Assessment. — Upon receipt from the court of an order for an assessment, two members of the board as designated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. Such an assessment shall include, but not be limited to, such factors as:

(1) Age of the offender.

(2) Offender's prior criminal record, sexual offenses as well as other offenses.

(3) Age of the victim.

(4) Whether the offense involved multiple victims.

(5) Use of illegal drugs by the offender.

(6) Whether the offender completed any prior sentence and whether the offender participated in available programs for sexual offenders.

(7) Any mental illness or mental disability of the offender.

(8) The nature of the sexual contact with the victim and whether the sexual contact was part of a demonstrated pattern of abuse.

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(9) Whether the offense included a display of unusual cruelty by the offender during the commission of the crime.

(10) Any behavioral characteristics that contribute to the offender's conduct.

All State, county and local agencies shall cooperate in providing the necessary information as requested by the board in connection with the required assessment.

(d) Submission of report by board. — The board shall submit a written report containing its assessment to the court no later than 60 days from the date of conviction of the defendant. Where the board members disagree on the assessment of the offender, both members shall submit a written report to the court.

(e) Court review of findings. — Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this

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conviction of a crime of sexual violence specifically identified by the legislature in § 9793(b). The legislature has, unremarkably, determined that anyone convicted of a crime involving sexual violence can be considered a sexually violent predator. Once a defendant has been convicted of a sexually violent crime, the court orders an assessment of the offender's status by the State Board to Assess Sexually Violent Predators (as constituted in § 9799.3). The assessment board considers the various factors set forth in § 9794(c) and provides the court with a written report as to its assessment of the offender. These factors have a striking similarity to the information contained in any pre-sentence report,[2] specifically, the circumstances surrounding the crime

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> hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

42 Pa.C.S.A. § 9794.

2. Pursuant to Pa.R.Crim.P. 1403(3) "the pre-sentence investigation report shall include information regarding the circumstances of the offense and the character of the defendant sufficient to assist the judge in determining sentence." In ***Commonwealth v. Martin***, 466 Pa. 118, 351 A.2d 650 (1976), our supreme court noted with approval the ABA project on Minimum Standards of Justice essential and adequate elements of a pre-sentence report.

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26. '(A) a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;

(B) a full description of any prior criminal record of the offender;

(C) a description of the educational background of the offender;

(D) a description of the employment background of the offender, including any military record and including his present employment status and capabilities;

(E) the social history of the offender, including family relationships, marital status, interests and activities, residence history, and religious affiliations;

(F) the offender's medical history and, if desirable, a psychological or psychiatric report;

(G) information about environments to which the offender might return or to which he could be sent should probation be granted;

(H) supplementary reports from clinics, institutions and other social agencies with which the offender has been involved;

(I) information about special resources which might be available to assist the offender, such

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and the defendant's psychological evaluations. In fact, the Comment to Pa.R.Crim.P. 1403, governing the preparation and basic content of pre-sentence reports references § 9791-9799.5. As with any pre-sentence report, fact-finding is necessary and the report is prepared at the direction of and for the aid of the court in determining the defendant's status for sentencing and notification purposes.

Although a defendant may object to matters contained in a pre-sentence report, the Commonwealth has no burden to prove any matter contained in the report. This is true even

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> as treatment centers, residential facilities, vocational training services, special educational facilities, rehabilitative programs of various institutions to which the offender might be committed, special programs in the probation department, and other similar programs which are particularly relevant to the offender's situation;
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> (J) a summary of the most significant aspects of the report, including specific recommendations as to the sentence if the sentencing court has so requested.'
>
> ABA Project on Minimum Standards of Justice, Standards Relating to Probation, § 2.3 (Approved Draft, 1970). See also, Advisory Council of Judges of the National Probation and Parole Association, Guides for Sentencing, 33-47 (1957).

Martin, *supra* at __ n.26, 351 A.2d at 658 n.26.

when a sentence enhancement hinges on additional facts not otherwise in evidence in the guilt-determining phase. ***McMillan***, *supra* (finding by sentencing court of visible possession of a firearm in commission of crime is a constitutional sentencing enhancement factor and not an element of the crime which required proof beyond a reasonable doubt), *affirming* ***Wright***, *supra*; ***Commonwealth v. Allen***, 508 Pa. 114, __, 494 A.2d 1067, 1070 (1985) (evidence of prior violent felony conviction pursuant to 42 Pa.C.S. § 9714 (repealed) could be introduced at sentencing to allow imposition of increased sentence for repeat violent offenders). In each of these cases, the defendants raised a due process concern similar to the one addressed in ***E.B. v. Verniero***, 119 F.3d 1077 (1997), relied upon by the majority in this case, regarding the evidentiary burden.

Undeniably, the risk of re-offense is at the heart of the Pennsylvania legislation. The Legislative Findings and declaration of policy set forth in § 9791 make it clear that the entire Act is directed to protecting communities against the risks posed by a particular class of sexual offender: those who commit crimes of sexual violence. However, unlike the New Jersey law at issue in ***Verniero***, our Legislature has not made risk of re-offense a fact-finding determination under § 9794. As a review of § 9794(c), *supra*, indicates, the factors considered by the court and the assessment board are strikingly similar to the factors considered in any pre-sentence investigation. In contrast, the New Jersey statute requires prosecutors to utilize extensive guidelines and to assess the risk of re-offense. It is the prosecutors who weigh such factors as whether the offender is under supervision or receiving counseling, therapy, or treatment; whether the

offender's physical condition makes re-offense unlikely; and whether the offender's conduct was characterized by compulsive or repetitive behavior. ***Verniero***, 119 F.3d at 1083, citing N.J.S.A. § 2C:7-8b. The Third Circuit found it particularly significant that *prosecutors* assessed the risk of re-offense; that the offender bore the burden of persuasion in a summary *in camera* proceeding potentially held years after conviction; and that the court's review was limited to deciding only whether the prosecutors selected the correct Tier classification. Within the context of the New Jersey hearing, the offender's ability to test the prosecutors' determination was severely limited, as was his ability to call and confront witnesses.

Additionally, to the degree that risk of re-offense is always an issue in *any* sentencing proceeding, I do not believe a defendant confronted with a Megan's Law determination is entitled to a heightened form of procedural due process. A defendant's liberty interest is no more threatened by the Megan's Law registration, notification, and maximum sentence provisions than it is by any other mandatory incarceration provision. *See* ***Allen***, *supra* at __, 494 A.2d at 1071, quoting ***Wright***, *supra* at __, 494 A.2d at 361 ("The liberty interest of a defendant facing a sentencing proceeding pursuant to [an enhanced sentencing provision] is similar to that of other convicted defendants awaiting sentence.").

I find a helpful analogy in the Sentencing Guidelines promulgated by our Legislature. 42 Pa.C.S.A. §9721. The Legislature developed these Guidelines based on the research of criminologists, sociologists, psychologists, public policy analysts, and others involved in the criminal justice system.

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These Guidelines provide a court with a consistent starting-point, a presumption if you will, when sentencing a particular defendant convicted of a particular crime, and take into account the gravity of the offense and the defendant's prior record. The court may then order a pre-sentence investigation report, which evaluates the factors noted *supra*. At the sentencing hearing, the defendant may challenge the accuracy of the report, and, at the court's discretion, may call witnesses to testify as to his good character, or to other mitigating circumstances. The court then exercises its discretion and imposes a sentence, either within or outside the Guidelines, so long as it is not greater than the statutory maximum for the offense.

Likewise, under the Megan's Law provision of the Sentencing Code, the legislature has determined, after consulting with experts in criminal justice and human psychology, that the starting point for violent sexual offenders is a presumption that they will offend again. The idea that the board should presume sexually violent predator status based on a conviction for a sexually violent crime is a reasonable starting point. The court then orders the board to assess the particular offender, pursuant to § 9794(a) and (c). After receiving the board's assessment, the court then holds a full and complete hearing, at which the offender is entitled to an opportunity to be heard on the issue of whether he is a sexually violent predator.[3] The court then exercises its

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3. Interestingly, not all individuals who commit crimes of sexual violence are ultimately "sexually violent predators" under the Pennsylvania Act. Rather, the Act defines a sexually violent

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discretion and finds either that the offender is not a sexually violent predator, and is therefore only subject to the registration provisions, ***Commonwealth v. Mountain***, 711 A.2d 473 (Pa.Super. 1998), or that he is a sexually violent predator, in which case he is also subject to the notification and maximum sentence provisions.

The ***Verniero*** court and the majority hold, however, that the determination of sexually violent predator status is a fact-finding function; and to reduce the risk of error, the burden of proof must be on the prosecution by clear and convincing evidence. For the reasons that follow, I disagree.

In ***McMillan***, the Supreme Court upheld the constitutionality of the Pennsylvania Mandatory Minimum Sentencing Act of 1982. This statute required a mandatory minimum sentence to be imposed if the sentencing court found by a mere preponderance of the evidence that the defendant visibly possessed a firearm in commission of the offense. This fact was not an element of the underlying crime. In making such a finding, the sentencing judge could consider the evidence introduced at trial and any additional evidence offered by the defendant or the Commonwealth at the sentencing hearing. The defendant argued that to satisfy due process, this fact must be found by at least clear and

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predator as a person who has been convicted of an enumerated offense and who has been found to be a sexually violent predator under § 9794(e) "*due to a mental abnormality or personality disorder* that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. § 9792 (emphasis added).

convincing evidence. The Supreme Court, "[h]aving concluded that States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense," rejected this due process claim:

> Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. See ***Williams v. New York***, 337 U.S. 241 (1949). *Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.*

McMillan, 477 U.S. at 91-93 (emphasis added) (footnote omitted). ***McMillan*** cited with approval ***United States v. Davis***, 710 F.2d 104, 106 (3d Cir. 1983) (collecting cases), *cert. denied*, 464 U.S. 1001 (1983), which rejected a due process challenge to the federal 'dangerous special offender' statute, 18 U.S.C. § 3575. This statute allows courts to increase sentences if they find by a preponderance of the evidence that the defendant is a dangerous special offender.

Just as voluntary possession of a firearm was a 'sentencing consideration' in ***McMillan***, I believe the defendant's status as a sexually violent predator is a 'sentencing consideration' here. In ***McMillan***, the court astutely noted that "the Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment — the instrumentality used in

committing a violent felony — and dictated the precise weight to be given that factor if the instrumentality is a firearm." 477 U.S. at 89-90. Naturally, a limited degree of fact-finding is necessary for the court to determine whether the enhancement should apply. Similarly, in this case the Legislature has taken one factor that has always been considered when sentencing: namely, the risk posed to society by a certain class of criminal, and has meted out certain consequences if the court finds that the defendant falls within that class.

Even the ***Verniero*** court recognized the difference between the hearing provided by the New Jersey statute and the due process requirements in sentencing proceedings, addressed by ***McMillan***:

> Here, however, we are not dealing with sentencing. Sentencing occurs during and is part of the criminal proceeding; its purpose is to specify the sanction to be imposed as a result of one's conviction by proof beyond a reasonable doubt. A Megan's Law hearing, by contrast, is a civil proceeding that stands apart from the criminal proceeding in which one was convicted and sentenced. See ***C.A.***, *679 A.2d at 1164*. n29 Moreover, as we have discussed, the factual determinations required in a Megan's Law hearing are of greater complexity than those typically involved in sentencing. Accordingly, we conclude that it is entirely consistent with McMillan to

require a higher standard of proof in a Megan's Law proceeding.

Verniero, 119 F.3d at 1111.[4]

I recognize that in this case it was the offender who was assigned a higher evidentiary burden to rebut the presumption that he is a sexually violent predator. However, since I can

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4. ***Verniero*** analogized the New Jersey proceedings to the civil proceedings in ***Addington v. Texas***, *441 U.S. 418 (1979)*, and ***Santosky v. Kramer***, 455 U.S. 745 (1982). Those cases held that the 'clear and convincing evidence' standard applied where the state sought involuntary commitment to a mental institution and involuntary termination of parental rights, respectively. Importantly, ***McMillan*** distinguished ***Addington*** and ***Santosky*** as follows:

> Quite unlike the situation in those cases, criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable-doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.' ***Meachum v. Fano***, *427 U.S. 215, 224 (1976). As noted in text, sentencing courts have always operated without constitutionally imposed burdens of proof;* embracing petitioners' suggestion that we apply the clear-and-convincing standard here would significantly alter criminal sentencing, for *we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence.*

McMillan, 477 U.S. at 92 n.8 (emphasis added).

find nothing that would specifically preclude such a presumption at sentencing, I cannot conclude that it is unconstitutional. The presumption arises from the fact of a conviction, not from any burden of persuasion at sentencing. The Commonwealth has already met its burden of persuasion in securing the conviction on which the offender's status is automatically based. As to whether the offender may be required to rebut the presumption by clear and convincing evidence, I refer to the ***McMillan*** court's caveat regarding constitutionalizing burdens of proof at sentencing. Our Legislature has deemed a particular fact relevant, the conviction of a sexually violent offense, and prescribed a particular burden of proof to the offender to relieve himself of the more severe consequences of his actions. Because the Act merely provides specific consequences under certain designated circumstances (as the Legislature does in many other sentencing contexts), I find no constitutional infirmity.

Even if the Act were not a sentencing statute, however, I would find no due process violation here. In ***Specht v. Patterson***, 386 U.S. 605 (1967), the Court found the Colorado Sex Offenders Act unconstitutional for its lack of due process protections. The defendant was convicted of a sex offense carrying a ten-year maximum sentence. However, the trial court, pursuant to the Act, subjected the defendant to a psychological examination without a hearing or right of confrontation. This examination was designed to help the court determine whether the defendant constituted, *inter alia*, a threat of bodily harm to the public. Based on the results of the examination, the court sentenced defendant to an indeterminate term of one day to life. The Supreme Court, in an opinion by Justice Douglas, first reaffirmed the general

proposition that "the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed." *Id.* at 606. However, the Court then found that the psychological hearing was a separate criminal proceeding on a distinctly new factual issue leading to separate criminal punishment:

> The case is not unlike those other recidivist statutes where an habitual criminal issue is 'a distinct issue' (***Graham v. West Virginia***, *224 U.S. 616, 625*) on which a defendant 'must receive reasonable notice and an opportunity to be heard.' ***Oyler v. Boles***, *368 U.S. 448, 452;* ***Chandler v. Fretag***, *348 U.S. 3, 8.* Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

Specht, 386 U.S. at 610-611.[5] The Court struck down the Colorado Act, not because it was an unconstitutional exercise of legislative authority, but because it lacked any procedural due process safeguards.

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5. ***Specht*** distinguished the statute at issue in ***Minnesota v. Probate Court***, 309 U.S. 270 (1940), where "in a proceeding to have a person adjudged a 'psychopathic personality' there was a hearing where he was represented by counsel and could compel the production of witnesses on his behalf." ***Specht***, supra at 610, citing ***Minnesota***, 309 U.S. at 275.

Specht also discussed, with approval, ***Gerchman v. Maroney***, 355 F.2d 302 (3d Cir. 1966), which invalidated an almost identical Pennsylvania statute, the Barr-Walker Act. In ***Gerchman***, the Third Circuit determined that due process was required at Barr-Walker proceedings because they represented a separate and distinct criminal proceeding on a new factual matter, rather than a simple sentencing proceeding resulting from the conviction:

> [Defendant's due process] rights therefore were violated by a determination made at a hearing at which the only evidence against him was the Commissioner's report to the court containing ultimate findings of fact based upon reports of a 'confidential' psychiatric examination and a probation investigation. Neither the Commissioner nor those who reported to him appeared at the hearing. Petitioner had no opportunity to confront them, much less to cross-examine them regarding the findings of the Commissioner or the unsworn reports of the investigations on which they were based.

Gerchman, 355 F.2d at 309. The court emphasized that the basis of punishment was "an essentially *independent* criminal offense" — namely, a determination that the defendant constitutes a threat of harm to the public. *Id.* at 311 (emphasis added). Conversely, in ***U.S. v. Davis***, *supra*, the Third Circuit upheld the Federal Dangerous Special Offender Status Act, 18 U.S.C. § 3575(b), noting that it afforded all the procedural protections required by ***Specht***: a hearing, counsel, compulsory process, cross-examination of witnesses, and

findings on the record to allow meaningful appellate review.[6] ***Davis***, 710 F.2d at 106-107. Finally, in ***McMillan***, *supra*, the Supreme Court held that ***Specht*** did not require the Commonwealth to prove facts at sentencing by clear and convincing evidence. The court noted that in ***Specht***, "the defendant had a right to be present with counsel, to be heard, to be confronted with and to cross-examine the witnesses against him, and to offer evidence of his own." ***McMillan***, 477 U.S. at 88-89.

Returning to § 9794, and evaluating it in line with the dictates of ***Specht***, *supra*, and ***Gerchman***, *supra*, I believe it is in the *court* review of the findings of the board that Pennsylvania stands apart from New Jersey and the concerns of ***Verniero***. Unlike the New Jersey Megan's Law hearings at issue in ***Verniero***, the court in Pennsylvania, before applying either the registration and notification procedures to a particular offender or imposing the mandatory maximum sentence, must allow very specific due process. Both the defendant and the Commonwealth are provided notice of the hearing, and an opportunity to be heard on the matters contained in the assessment report. There is a right to call and cross-examine witnesses without restriction, and the right to present expert witnesses. The offender also has the right to court-appointed counsel. After a full and complete hearing,

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6. ***Davis*** rejected the defendant's argument that due process required all findings made by the sentencing judge to be based on proof beyond a reasonable doubt. The court upheld the preponderance standard utilized under the statute. ***Davis*** held that ***Specht*** and ***Gerchman*** do not require proof at sentencing beyond a reasonable doubt, and noted that the standard of proof question was not at issue in those cases. ***Davis***, 710 F.2d at 107 n.1.

the trial court must determine, considering all the evidence and the board's assessment, whether the presumption has been rebutted that because the offender committed a sexually violent offense, he should be sentenced as a sexually violent predator. All the due process required by ***Specht*** is already provided by the Pennsylvania Act. As set forth *supra*, I suggest this is ample due process.

I believe the toughest issues involving so-called "Megan's Law" legislation are the ones previously addressed by this court and ratified in this appeal; specifically, finding that the registration and notification provisions of the Act are non-punitive in nature and serve a substantial and important interest of the Commonwealth in protecting its citizens from the risks associated with a particular type of offender. Once we are satisfied that appellant's substantive constitutional rights are not implicated with respect to these claims, then pursuant to § 9794, we are left with nothing more than a sentencing statute and the due process considerations relevant to sentencing proceedings. I do not believe a challenge to procedural due process at a sentencing proceeding can carry the day.

I have little doubt that were we only considering whether the mandatory maximum sentence for sexually violent predators was constitutional, we would have little trouble dismissing the due process claim and upholding the authority of Legislature to design sentencing enhancements.[7] This

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7. In ***Almendarez-Torres v. U.S.***, __ U.S. __, 118 S.Ct. 1219 (1998), the Supreme Court held that a recidivist sentencing enhancement which increased the *permissible* maximum to life

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conclusion should not be different with respect to registration and notification procedures, especially because we have determined them to be civil in nature and non-punitive. The fact that these provisions, for purposes of appellant, apply in the context of a sentencing proceeding does not change that result. *See* 42 Pa.C.S.A. § 9721(b) ("the court shall follow the general principle that the sentence imposed should call for confinement that is *consistent with the protection of the public*, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.") (emphasis added). As decided by ***Mountain***, *supra*, ***Commonwealth v. Gaffney***, 702 A.2d 565 (Pa.Super. 1997), *appeal granted*, 710 A.2d 605 (1998), ***Artway v. Attorney General***, 81 F.3d 1235 (3d Cir. 1996), and ***Verniero***, *supra*, such registration and notification requirements meet constitutional scrutiny. Moreover, the inclusion of civil consequences for convictions of certain crimes is not impermissible. *See* ***Commonwealth v. Wingait Farms***, 547 Pa. 332, 690 A.2d 222 (1997) (in rem civil forfeiture following conviction on a drug offense was not excessive and therefore not punitive), *cert. denied sub nom.* ***Reitz v. Pennsylvania***, __ U.S. __, 118 S.Ct. 98 (1997); ***Krall v. Commonwealth of Pennsylvania Department of Transportation***, 682 A.2d 63 (Pa.Commw. 1996) (license suspension for a conviction under 75 Pa.C.S. § 3731 is a remedial sanction and civil in nature).

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imprisonment was not unconstitutional. Based on this analysis, I can see no practical distinction between increased penalties, which allow a *permissive* maximum of life imprisonment and a *mandatory* maximum of life imprisonment.

Based on the foregoing, I firmly believe that the Pennsylvania Registration of Sexual Offenders Act meets constitutional muster. I find the sentencing procedures under the Pennsylvania Act to be very different procedurally from the law at issue in ***Verniero***, and more akin to the enhanced sentencing provisions of ***McMillan***. I also rely upon the Supreme Court's admonition that we not constitutionalize burdens of proof in sentencing proceedings. Moreover, the Legislature was very careful to draft the legislation to afford the offender all the due process protection to which he would be entitled in a proceeding as directed by such decisions as ***Specht*** and ***Gerchman***. For these reasons, I do not find "a clear, palpable and plain demonstration that [§ 9794] violates a constitutional provision [,]" ***Mountain***, 711 A.2d at 475, and would uphold the constitutionality of the Act.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2183 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EDWARD JAMES HALYE,

Appellant

Appeal from the Judgment of Sentence, May 6, 1997,
In the Court of Common Pleas of Luzerne County,
Criminal Division, No. 2850 of 1996

BEFORE: McEWEN, P.J., DEL SOLE, KELLY, POPOVICH, FORD ELLIOTT, JOYCE, MUSMANNO, ORIE MELVIN AND SCHILLER, JJ.

CONCURRING AND DISSENTING OPINION BY JOYCE, J.:

I agree with the majority's conclusions regarding the constitutionality of 42 Pa.C.S.A. § 9794 and join in this part of the majority opinion. However, as I believe that the evidence was sufficient to sustain Appellant's conviction for endangering the welfare of children, I respectfully dissent as to this issue.

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> In determining whether the Commonwealth has met its burden of proof, the test to be applied is: [w]hether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Valette, 531 Pa.384, 388, 613 A.2d 548, 549 (1992) (citations and quotation marks omitted).

A person commits the crime of endangering the welfare of a child if he is a parent, guardian or other person supervising the welfare of a child under 18 years of age and knowingly endangers the child by violating a duty of care, protection and support.[1] 18 Pa.C.S.A. § 4304(a). In applying this statute, this Court has held that the Commonwealth satisfies its evidentiary burden by proving that: (1) the accused is aware of his or her duty to protect the child;

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1. It is undisputed that Appellant was not the parent or guardian of the victim. Accordingly, my analysis will focus on the supervision element.

(2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and (3) that the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare. ***Commonwealth v. Martir***, 712 A.2d 327, 328-329 (Pa. Super. 1998).

Appellant asserts that the evidence is inadequate because he was not asked to "supervise" the welfare of the victim. Appellant's Brief at 12. While the majority accepts this position, ***see*** Majority Opinion, *ante* at 4, the statute does not identify explicit parental request for supervision as an element of the crime. Nor would I read this requirement into the statute.

The appellate courts have recognized that section 4304 is a juvenile statute which is basically protective in nature and designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. ***Commonwealth v. Mack***, 467 Pa. 613, 617, 359 A.2d 770, 772 (1976). ***Commonwealth v. Ogin***, 540 A.2d 549, 553 (Pa. Super. 1988) (*en banc*). The statute therefore must be given meaning by reference to the common sense of the community and the broad protective purposes for which it was enacted. ***Commonwealth v. Mack***, 467 Pa. at 618, 359 A.2d at 772; ***Commonwealth v. Ogin***, 540 A.2d at 553. The term "supervise" is defined to mean "to oversee with the powers of direction and decision the implementation of one's own or another's intentions." Webster's Third New International Dictionary 2296 (1976). ***See also*** Black's Law Dictionary 1438 (6th ed. 1990) (defining supervise as to have general

oversight over, to superintend or to inspect). In essence then, supervision entails oversight of and the power to direct the actions of another. Utilizing this definition, the evidence sufficiently proved Appellant's supervision of the welfare of the victim.

The evidence presented at trial established that Appellant was the cousin of the victim's mother. N.T. 1/20/97 at 67. Appellant came to the victim's residence to visit. ***Id.*** at 67-68. Appellant, who was apparently speaking with the adults, excused himself and went to the bathroom. ***Id.*** at 69.

After using the bathroom, Appellant went into the bedroom where the victim and his sister were playing. ***Id.*** at 29-30, 38-39 and 68-69. Appellant asked the victim to sit on his lap. ***Id.*** at 30. When he refused, Appellant placed the child on his lap. ***Id.*** Appellant then asked the victim's sister if she could play the game by herself. ***Id.*** at 49. Upon receiving her affirmative response, Appellant got up and entered the bedroom closet. ***Id.*** at 30 and 49.

Appellant repeatedly asked the victim to accompany him in the closet. ***Id.*** at 30 and 39. The victim refused. ***Id.*** at 30. Appellant then grabbed the victim by his arm and pulled him into the closet where he forcibly pulled down the victim's shorts and underpants and proceeded to molest the victim. ***Id.*** at 30-33, 44-45 and 47.

While Appellant was not specifically asked to oversee or supervise the children, he voluntarily arrogated that role to himself by entering the children's bedroom and involving himself in their games. He then directed and forced the victim

to enter the closet and submit to Appellant's unwanted sexual acts. This evidence was sufficient to prove that Appellant oversaw or supervised the victim. To hold the evidence insufficient merely because the victim's mother did not specifically ask Appellant to supervise the children ignores Appellant's status as an adult relative who assumed a position of authority over the victim. Because the evidence was sufficient to sustain Appellant's conviction I would affirm the judgment of sentence.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2183 Philadelphia 1997

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EDWARD JAMES HALYE,

Appellant

Appeal from the Judgment of Sentence May 6, 1997
in the Court of Common Pleas of Luzerne County,
Criminal, No. 2850 of 1996.

BEFORE: McEWEN, P.J., DEL SOLE, KELLY, POPOVICH, FORD ELLIOTT, JOYCE, MUSMANNO, ORIE MELVIN, and SCHILLER, JJ.

CONCURRING OPINION BY ORIE MELVIN, J.:

While I join this en banc opinion, I write separately to express my belief that despite the procedural due process infirmity of § 9794 of Title 42 the purpose of such a law remains a laudable and achievable goal which should not be discarded nor its implementation abandoned. I would therefore encourage our General Assembly to act expeditiously in making revisions that will comport with the constitutional mandates expressed in the majority opinion.

Appendix A

While not addressed by the majority, it is noteworthy to mention that similar legislation has withstood constitutional scrutiny by the United States Supreme Court on substantive due process, double jeopardy and ex post facto grounds. ***See Kansas v. Hendricks***, __ U.S. __, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997). Unlike our law, the Kansas Sexually Violent Predator Act[1] places the burden of proof upon the State and was therefore not assailable on procedural due process grounds. Moreover, the Kansas Act provides an alternative method for dealing with violent sexual predators. Rather than increasing an offender's maximum term of imprisonment or imposing a mandatory life sentence the Kansas law establishes a procedure for the civil commitment of such persons. As outlined by the United States Supreme Court in ***Kansas v. Hendricks***, ***supra***,

> the Act's civil commitment procedures pertain[s] to: (1) a presently confined person who . . . 'has been convicted of a sexually violent offense' and is scheduled for release; (2) a person who has been 'charged with a sexually violent offense' but has been found incompetent to stand trial; (3) a person who has been found 'not guilty by reason of insanity of a sexually violent offense'; and (4) a person found 'not guilty' of a sexually violent offense because of a mental disease or defect.

Id. 117 S. Ct. at 2077.

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1. Kan. Stat. Ann. 59-29a01 to 59-29a15 (1994 & Supp. 1996).

Appendix A

When a petition seeking civil commitment is filed under the Kansas Act, the court must first determine whether "probable cause" exists to support a finding that the person is a "sexually violent predator" and thus eligible for civil commitment. If such a determination is made then the individual is transferred to a facility for professional evaluation. § 59-29a05. Following the evaluation, a trial would be held to determine whether the individual was a sexually violent predator with the proof being beyond a reasonable doubt. If found to be a predator, the person is transferred to the custody of the Secretary of Social and Rehabilitation Services for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." § 59-29a07(a). Therefore I believe, in addition to the criminal sanctions provided by the instant legislation, our Commonwealth would be well-served by a closer examination into the viability of a civil commitment alternative.

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY DATED SEPTEMBER 10, 1997

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY
CRIMINAL

NO. 2850 OF 1996

COMMONWEALTH OF PENNSYLVANIA

V

EDWARD JAMES HALYE

OPINION

This matter is currently on appeal of Defendant, Edward James Halye, from the imposition of sentence under the Registration of Sexual Offender's Act, more commonly known as "Megan's Law".[1] Specifically, the Defendant challenges the constitutionality of Pennsylvania's Megan's Law. This opinion is submitted in support of the sentence imposed in accordance with and pursuant to Pa. R.A.P. Sec. 1925(a).

By way of background, during a trial commencing on January 21, 1997, Defendant was convicted of Involuntary Deviate Sexual Intercourse (18 Pa. C.S.A. Sections

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1. Pa. C.S.A. Sections 9791 et. seq. Throughout this Opinion the Registration of Sexual Predators Act shall be referred to as "Megan's Law" or the "Act".

3123(a)(2) and (a)(6); indecent assault (18 Pa. C.S.A. Sections 3126(a)(1) and (a)(7); corruption of minors (18 Pa. C.S.A. Section 6301(a)); and endangering the welfare of children (18 Pa. C.S.A. Section 4304)). Since both involuntary deviate sexual intercourse and indecent assault are predicate offenses under the Act, this Court initiated the procedures to determine if the Defendant was a "violent sexual predator". By Order dated April 16, 1997, after a review of the record and a hearing, this Court found that Defendant was a "sexually violent predator" and, as such, subject to all terms, conditions and requirements imposed by law. At sentencing on April 18, 1997, in accordance with the Act, the Defendant was sentenced to life imprisonment. This appeal followed.

Pennsylvania's Megan's Law was initially adopted and signed into law on October 24, 1995, becoming effective on April 22, 1996. An amendment signed by the Governor on May 22, 1996, took effect immediately. The passage of the Act was in response to the death of Megan Kanka, of New Jersey, who was abducted, raped, and murdered near her home by a twice convicted sexual offender living across the street. Neither the residents of the neighborhood nor the police of the community were aware of the presence of a convicted sexual offender in the neighborhood. The outcry of the community was overwhelming and New Jersey passed its Registration and Community Notification Laws in October, 1994. Many state laws, including Pennsylvania and New York, along with a similar federal law, followed.

Upon being convicted of certain sexually related crimes, the Pennsylvania Act requires a defendant to register a

current address with the Pennsylvania State Police upon release from incarceration, upon parole, or probation. In addition, the State Board to Assess Sexually Violent Predators (Board), created under the Act, is charged with the responsibility to make a determination of the status of the Defendant as a sexually violent predator within sixty (60) days of the conviction.[2] In making the assessment, the Board is to consider such factors as the age of the offender; prior criminal record, sexual offenses and other offenses; the age of the victim; the use, if any, of drugs; any mental illness or mental disability; the nature of the sexual contact; and any behavioral characteristics that contribute to the offender's conduct.[3] In making the assessment, the Board shall presume the offender is a "violent sexual predator" which presumption is rebuttable by clear and convincing evidence. The Board submits a report to the Court which is then required to determine if the offender is a "sexually violent predator" based on the evidence presented at a hearing held prior to sentencing and before the trial Judge. The Court next determines if the presumption of "sexually violent predator" has been rebutted.[4] Once a finding of "sexually violent

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2. The sexually related crimes are: 18 Pa. C.S.A. Section 2901 (relating to kidnapping, except by a parent); 18 Pa. C.S.A. Section 3121 (rape); 18 Pa. C.S.A. Section 3123 (involuntary deviate sexual intercourse); 18 Pa. C.S.A. 3125 (aggravated indecent assault); 18 Pa. C.S.A. Sections 5902(b) (relating to obscene and other sexual materials and performances); 18 Pa. C.S.A. Section 3128(a) and (b) (relating to spousal sexual assault) and, in certain instances, 18 Pa. C.S.A. 3126 (indecent assault).

3. 42 Pa. C.S.A. Section 9794(d).

4. 42 Pa. C.S.A. Section 9794(e).

predator" is made, the Act requires a mandatory minimum sentence of life imprisonment.[5]

The Defendant raises issues of constitutionality of Megan's Law along with issues of due process, double jeopardy and self-incrimination. In analyzing the constitutionality of the Act, we must first begin with the issue of punishment.

The Third Circuit first decided the issue of what constitutes punishment in the context of registration in ***Artway v. Attorney General***, 81 F3d 1235 (1996), and devised a three pronged test consisting of the following factors: (1) what was the actual purpose in enacting the registration requirements; (2) what is the objective purpose of the law; and (3) is the effect so harsh as a matter of degree that it constitutes punishment. *Supra.* 1263-1266. Subsequently, the United States Supreme Court handed down a decision in ***United States v. Usury***, 116 S. Ct. 2135 (1996). ***Usury*** involved a determination as to whether or not a civil forfeiture should be considered punishment. As a result of the analysis used in ***Usury***, the Third Circuit recently decided that ***Usury*** did not require the abandonment of the Artway analysis. ***W.P. et al., v. Peter Verniero, Attorney General, et al.***, 1997 U.S. App. LEXIS 22316 (August 20, 1997).

Defendant also cites ***Lynce v. Mathis***, 60 Crim. L. Reptr. 2081 (U.S. 1997) as support for his position that the Act should be considered punitive.[6] ***Lynce*** held the retroactive

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5. 42 Pa. C.S.A. Section 9799(b).

6. ***Lynce*** is a recent case which is not yet reported.

repeal of good time credits which resulted in the named defendant being rearrested and sent back to prison constituted an increase in punishment. The Court there analyzed the effect of the cancellation of overcrowding good time credits and the resulting incarceration of the defendant. Although the Third Circuit did not discuss ***Lynce*** in its recent decision, it is our opinion the ***Lynce*** decision does not change the analysis of ***Artway***. As such, we shall apply the three prong test of ***Artway*** to the matter before us.

As indicated, the first prong of ***Artway*** scrutinizes the Legislative intent in enacting the Act. To do so, we turn to the Act itself, which unambiguously states the purpose of the law is to notify the community of sexually violent predators so the community can develop constructive plans to prepare themselves and their children. This is primarily to protect the community from the high risk posed by repeat offenders. Such protection is of a paramount governmental interest.[7] Obviously the purpose of the legislation was and is the protection of children. Although Defendant cites other remarks of legislators to support his contention that the statute is primarily one of retribution, the argument ignores the explicit findings of the legislature as a whole in enacting the Act. It is clear from the legislative history that the legislature carefully debated the purpose of the Act. This does not invalidate the stated purpose. Taking all the evidence in its totality, it is obvious the Pennsylvania legislature recognized that the children of our communities are our greatest asset; it is the responsibility of adults to protect and nurture that asset. To do any less would be a

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7. The explicit intent of the Legislature is embodied in the statute 42 Pa. C.S.A. Section 9791.

dereliction of our duties. As originally found in ***Artway***, and as recently affirmed by the Third Circuit, protecting the public and preventing crimes are the types of purposes the Supreme Court has found regulatory and not punitive.[8]

The second prong of our analysis is to evaluate the objective purpose of the Act. As ***Artway*** held, the relevant issue is whether or not the provisions of the law are "reasonably related" to a legitimate goal. It is sufficient that the legislative purpose fulfills the remedial end. We have no difficulty in determining the legitimate goal of protecting innocent children incapable of protecting themselves from predatory adults with criminal tendencies warrants the provisions of the statutes. Constant identification of the whereabouts of repeat sexual offenders through notification and registration requirements does not fit the common perception of punishment — the loss of freedom to move about without restrictions. Nothing in the Act restricts a sexually violent predator from relocating; it merely requires him to notify the community of his presence. A change of address typically requires notifications of various sorts, including in some instances, to governmental agencies. The requirements of the Act expand the list of notifications required. As identified in the Act, the notification and registration requirements assist the community in preparing for and protecting themselves from the free movement of such an individual. This is not punitive.

Nor can the increase in sentence be considered strictly punitive. The use of enhancements, such as a weapons

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8. Citations omitted.

enhancement, at sentencing has been upheld not only by our Courts but by our Supreme Court. In ***McMillan v. Pennsylvania***, 477 U.S. 79, 106 S. Ct. 2411 (1986), a five year mandatory sentence for possession of a firearm was approved. The requirement, then, of a life maximum for one adjudicated a "sexually violent predator", is appropriate.

Lastly, we address the third prong on ***Artway*** — which is the effect of the Act. Our Supreme Court has noted that it is not appropriate to analyze the effect of an action from the perspective of the Defendant since even remedial actions carry a "sting of punishment". ***United States v. Halper***, 490 U.S. 435, 109 S. Ct. 1892 (1989). A statutory procedure which serves a regulatory purpose is not considered punishment even though it may bear harshly on one affected. ***Fleming v. Nestor***, 363 U.S. 603, 80 S. Ct. 1367 (1960). The Defendant's brief is replete with instances of adverse actions taken against convicted criminals identified as sexually violent predators under various state Megan's Laws. He uses these instances to argue the punitive nature of the Act's provisions. We cannot agree with the Defendant's argument that all of the unfortunate actions perpetrated against certain individuals who have registered and followed notification procedures are to be considered effects of the Act. The incidents described in the Amicus Brief are actions taken by third parties resulting from information which is largely public even without notification requirements and are ultimately a result of the underlying conviction. We decline to hold that these actions, prospective and potential, invalidate the non-punitive nature of the Act.

As a result of our analysis under ***Artway***, we hold the Act is not punishment as defined by existing precedent.

Appendix B

Therefore, we turn to Defendant's next argument, the violation of the right to due process. Specifically, Defendant argues the provision of Megan's Law which defines him as a sexually violent predator deprives him of his rights to procedural due process by the imposition of a lifetime maximum sentence; by the requirement to give testimony against himself; and fails to follow criminal procedure. We disagree.

In addressing the provision of a lifetime maximum, we once again turn to the decision of ***McMillen*** where the Court held that proof of an additional element at sentencing is not a violation of due process. Defendant has attempted to distinguish McMillen by arguing the maximum of life does more than limit the sentencing Court's discretion in selecting a penalty within the range available thereby falling outside the mandates of ***McMillen***. In light of our previous finding that the Act is not punitive in nature, the maximum of life only furthers the protection of the public and serves a legitimate remedial goal. Hence, no due process violation occurs.

The argument against self incrimination must also fail for the same reason. The Defendant has already been convicted of the underlying offense. One's status as "sexually violent predator" is a civil determination which stands apart from the criminal proceeding. As such, Defendant's rights are in no way violated.

In addition, Defendant argues the Act deprives him of substantive due process through the imposition of a badge of infamy. As the Defendant notes, a government cannot

infringe on an individual's liberty without a compelling state interest. ***Reno v. Flores***, 507 U.S. 292, 113 S. Ct. 1439 (1993). Before an offender can invoke a due process claim for loss of liberty, however there must be a protectable interest; the Supreme Court in ***Paul v. Davis***, 424 U.S. 693, 96 S. Ct. 1155 (1976) determined a loss of reputation alone cannot support the procedural protection of the due process clause. See also ***Mraz v. County of Lehigh***, 852 F. Supp. 1344 (ED. PA 1994). Applying this principle, Defendant's claim must fail.

Assuming, arguendo, that Defendant does have a protectable interest, we find his due process clause insufficient under ***Reno***. The legitimate goals of the state to keep the public, especially the children of our future, free from harm goes to the very core of a state's responsibility. It has no more compelling interest than to safeguard the life and liberty of all its citizens. Requiring offenders previously convicted of sexual offenses to notify governmental agencies and register as "sexually violent predators" is necessary to ensure that all citizens at risk from further crime are fully informed and able to take such preventive action as is legally possible. Law enforcement agencies, likewise, are sufficiently informed so as to more carefully protect the communities' citizens, all in furtherance of the state's responsibility.

Since the remaining arguments of Defendant relating to this issue presume a criminal procedure and we have held the Act is a civil procedure, we need not address them.

Similarly, Defendant alleges the designation of "sexually violent predator" is a violation of his right to privacy. A

constitutionally protected right to privacy is found in Article I, Section I of the Pennsylvania Constitution. The Pennsylvania Supreme Court has stated that in assessing the loss of the right to privacy, there is an implicit balancing of an individual's right to privacy against a countervailing state interest. Governmental intrusion into a person's affairs is justifiable when the government's interest is significant; the intrusion must effect the State's purpose. ***Denoncourt v. Common, State Ethics Commission***, 470 A.2d 945, 504 Pa. 191 (1993).

As previously discussed at length, the need of the government to protect the whole of the community from those reasonably identified as dangerous is the cornerstone of the government's responsibility. Here, every safeguard has been taken to assure that any perceived loss of privacy on the part of the convicted criminal is minimal. The Act sets forth the specific groups of citizens who have a legitimate need to be made aware of the presence of a convicted criminal with a predilection to commit sexual crimes. Deliberate precautions are taken throughout the procedure leading to the designation of "sexually violent predator". The designation is not made lightly; despite the original presumption of "sexually violent predator", the offender can overcome the designation through the use of expert witnesses and other testimony. Additionally, the sexually violent predator can petition for a reconsideration of the designation every five years.[9] Accordingly, with these protections in place, we are convinced the loss of privacy is minimal in relation to the responsibilities of the government.

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9. 42 Pa. C.S.A. Section 9794(f).

Appendix B

Defendant next argues the Act is unconstitutionally vague. Specifically, he alleges impermissible vagueness of the term "sexually violent predator". Defendant claims the term's definition is "circular", arbitrary, and capricious. The Defendant further argues the terms "mental abnormality" and "personality disorder" add nothing but confusion.

To survive under a vagueness doctrine, the Act must be drawn with sufficient definiteness and specificity to provide fair warning of the conduct proscribed and to restrict the authority of governmental officials in enforcing the Act's provisions. ***Goldy v. Beal***, 429 F. Supp. 640 (MD Pa. 1972). Applying this principle to the statute at issue here, we find sufficient definiteness and specificity. The Act provides definitions for each of the relevant terms. In addition, the Court and the Board are given specific criteria to evaluate and analyze. While there is discretion to consider other factors not listed, there is little ability for the Court and the Board to ignore the requirements of the Act. There is a specific list of offenses, none of which are challenged for vagueness, to which the Act applies. A full hearing in which witnesses are allowed assures the opportunity of specific information needed by the Court to make a sexually violent predator designation. Since the Act provides ample safeguards to guide the Court and the Board, we decline to hold the Act void for vagueness.

Next, we address the argument of Defendant that the Act is in violation of the doctrine of double jeopardy. Defendant argues he is being tried on a greater included offense after being convicted on a lesser included offense. In making this argument, Defendant presumes being

designated a "sexually violent predator" is a criminal offense. As we have discussed throughout this opinion, the Act is not a punitive criminal proceeding. As a civil proceeding, it does not rise to the level of double jeopardy. See ***Usury***. Therefore, we reject Defendant's argument.

Defendant's last two arguments must fail on the basis of the same reasoning. The arguments of the Defendant allege the "sexually violent predator" provisions constitute cruel and unusual punishment and further constitute an unlawful bill of attainder.

Undeniably, the Eighth Amendment to the United States Constitution and Article I Section 13 of the Pennsylvania Constitution contain prohibitions against cruel and unusual punishment. For those provisions to be applicable, however, the relevant action complained of must constitute punishment. The Act does not. Further, the Supreme Court, in ***Rummel v. Estelle***, 445 U.S. 263, 100 S. Ct. 1133 (1980) held that cruel and unusual punishment was not applicable to the imposition of a life sentence under a recidivist statute. The legislature has broad authority to determine the length of a sentence.

A Bill of Attainder is defined as a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial.[10] Clearly, the Act does not fit this definition. Guilt for the enumerated crimes are determined through the established criminal procedure. Again, to follow the

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10. United States Constitution, Article I, Section 9, Clause 3.

Defendant's argument, we would have to agree the provisions of the Act are a trial and there is a crime entitled "Sexually Violent Predator". This is not so. There is no conviction under the Act. The legislature has not imposed guilt. Guilt is determined prior to the Act's application ever being applicable. Without a prior determination of guilt, the Act is immaterial. The legislature does not classify convicted criminals as "sexually violent predators"; it merely provides for a procedure to determine if the designation is appropriate. As indicated, that procedure includes an assessment by the Board and a review by the Court after a comprehensive hearing. Finally, as repeated throughout this Opinion, the Act does not inflict punishment. Since punishment is an element of a Bill of Attainder, the failure of a particular Act to punish requires Defendant to be defeated.

In summary we find the arguments and attacks upon Pennsylvania's "Megan's Law" without merit and declare and hold that this Act violates no Constitutional, statutory or procedural right, state or Federal, of this Defendant. The legislative directions of this law chart a Constitutional course which we find was properly followed. For all these reasons, the sentence imposed should be affirmed.

BY THE COURT,

s/ Toole, J

DATED: SEPTEMBER 10, 1997

APPENDIX C — SENTENCING OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, COUNTY OF LUZERNE DATED APRIL 18, 1997

COURT OF COMMON PLEAS —
CRIMINAL DIVISION
COUNTY OF LUZERNE

THE COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD HAYLE

* * *

CHARGE I.D.S.I. (2 cts) — In direct assault (2 cts) corr minors

No. 2850 1996

* * *

DISPOSITION Endg. welf child

DATE April 18, 1997

* * *

SENTENCING

On 2850 of 1996 — Ct. 2 I.D.S.I. — S.C.I. for a maximum term of life and a minimum of 10 years. Under Sexually Violent Predator Offender Act.

Appendix C

On 2850 of 1996 — Ct. 1 I.D.S.I. — Merges with Ct. 2

2850/96 — Ct. 4 Indecent assault — S.C.I. — 6 months to life consecutive to Ct. 2

2850/96 — Ct. 3 Ind. assault — Merges with Ct. 4

2850/96 — Ct. 5 Corr of minors — S.C.I. 6 months to 2 years consecutive to all others

2850/96 — Endg welf — S.C.I. 6 months to 2 years consecutive to all others

Total 138 months to life

Pay costs

Deft. must comply with Registration Act if and when Deft. is released

Defendant advised of appeal rights

Deft. remanded to S.C.T.

CLERK John Hyder Toole J. JUDGE

APPENDIX D — LETTER AND ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DECIDED SEPTEMBER 9, 1999 AND ENTERED SEPTEMBER 10, 1999

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

434 MAIN CAPITOL BUILDING
P.O. BOX 624
HARRISBURG, PENNSYLVANIA 17108
(717) 787-6181
http://www.courts.state.pa.us

SHIRLEY BAILEY
CHIEF CLERK

September 10, 1999

TO: Peter Paul Olszewski, District Attorney
Frank P. Barletta, Asst. District Attorney

RE: COMMONWEALTH OF PENNSYLVANIA

PETITIONER

V.

EDWARD JAMES HALYE

RESPONDENT

No. 0898 M.D. Allocatur Docket 1998

Appendix D

Dear Counsel:

This is to advise you that the attached order has been entered on the Petition for Allowance of Appeal filed in the above-captioned matter.

Very truly yours,
Office of the Prothonotary
Supreme Court of Pennsylvania

SB/ma
c: Hon. Patrick J. Toole, Jr.
Luzerne; 2850 OF 1996
Criminal Division
Basil G. Russin, Public Defender
Al Flora, 1st Asst. Public Defender

Appendix D

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 898 M.D. Alloc. Dkt. 1998

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

EDWARD JAMES HALYE,

Respondent

Petition for Allowance of Appeal from the Judgment and Published Opinion of the Superior Court

ORDER

PER CURIAM:

AND NOW, this 9th day of September 1999, the Petition for Allowance of Appeal is DENIED.

APPENDIX E — RELEVANT STATUTE

42 Pa. C.S.A. § 9794

§ 9794. Designation of sexually violent predators

(a) Order for assessment. — After conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the board. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.

(b) Presumption. — An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

(c) Assessment. — Upon receipt from the court of an order for an assessment, two members of the board as designated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. Such an assessment shall include, but not be limited to, such factors as:

(1) Age of the offender.

(2) Offender's prior criminal record, sexual offenses as well as other offenses.

(3) Age of the victim.

(4) Whether the offense involved multiple victims.

(5) Use of illegal drugs by the offender.

(6) Whether the offender completed any prior sentence and whether the offender participated in available programs for sexual offenders.

(7) Any mental illness or mental disability of the offender.

(8) The nature of the sexual contact with the victim and whether the sexual contact was part of a demonstrated pattern of abuse.

(9) Whether the offense included a display of unusual cruelty by the offender during the commission of the crime.

(10) Any behavioral characteristics that contribute to the offender's conduct.

All State, county and local agencies shall cooperate in providing the necessary information as requested by the board in connection with the required assessment.

(d) Submission of report by board. — The board shall submit a written report containing its assessment to the court no later than 60 days from the date of conviction of the defendant. Where the board members disagree on the assessment of the offender, both members shall submit a written report to the court.

(e) Court review of findings. — Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

(f) Subsequent board review. — No sooner than one year prior to release from a State or county correctional institution, or in five-year intervals thereafter, an offender designated as a sexually violent predator may petition the court with original jurisdiction in the matter for reconsideration of the determination. The court may review the determination and request a new report by the board. The court may enter an order terminating the designation in which case the court shall notify the Pennsylvania State Police.

* * * *

Supreme Court, U.S.
FILED
FEB 7 2000
CLERK

(2)

No. 99-981

IN THE

Supreme Court of the United States

October Term 1999

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

EDWARD HALYE,

Respondent,

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Al Flora, Jr.
First Assistant Public Defender
Luzerne County Courthouse
200 North River Street
Wilkes-Barre, PA 18711
(570) 825-1754

Attorney for Respondent

11 pp

The Respondent asks leave to file the attached Brief in Opposition without payment of costs and to proceed In Forma Pauperis.

The Respondent has been represented by the Public Defender's Office of Luzerne County Pennsylvania and has proceeded In Forma Pauperis in all State Court proceedings.

Respondent since his arrest on criminal charges which have led to the instant proceedings has been incarcerated in the State Court system from September 1996 to the present and is currently incarcerated at the State Correctional Institution at Huntingdon Pennsylvania.

Respondent's declaration in support of this motion is attached hereto.

Al Flora, Jr., Esquire
First Assistant Public Defender
Luzerne County Courthouse
200 North River Street
Wilkes-Barre, PA 18711-1854
(570) 825-1754

Attorney for Respondent

COMMONWEALTH OF PENNSYLVANIA :

Petitioner : **No.** 99-981

vs. :

EDWARD HALYE, : 2850 **Term, 19**96

Respondent :

I, Edward Halye **being first duly sworn, depose and say that I am** Respondent **in the above entitled case; that in support of my motion for leave to proceed on petition for writ of certiorari in forma pauperis without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress.**

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

JULY 1986

2. Have you received within the past twelve months any income from a business, profession or other form of self employment or in the form of rent payments, interest, dividends or other income? NO

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I UNDERSTAND THAT FALSE STATEMENTS OR ANSWERS TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Dated this 24 day of JANUARY, 2000.

Edward Halye

EDWARD HALYE

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $.46 **on account to his credit at the** SCI-HUntingdon **institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said** SCI-HUntingdon **institutions:** NONE

Charles E. Martin, Business Manager II

PA DEPT. OF CORRECTIONS — INMATE ACCOUNTS SYSTEM — RUN IAS365
BUREAU OF COMPUTER SERVICES — PARTIAL ACCOUNT LISTING — DATE 1/28/2000
REMOTE PRINT TIME 14:22 — FROM PURGE FILE — PAGE 1

INMATE NUMBER	NAME LAST	FIRST	MI	STARTING BALANCE
DK3707	HAYLE	EDWARD		-1.10

BATCH #	DATE MO DY YEAR		TRANSACTION DESCRIPTION	TRANSACTION AMOUNT	BALANCE AFTER TRANSACTION
7725	07-13-1999	10	MAINTENANCE PAYROLL JUNE, 1999	22.00	20.90
7734	07-13-1999	38	INSIDE PURCHASES XEROX COPIES WK ENDING 7/3/99	-.60	20.30
7741	07-14-1999	37	POSTAGE UNITED PARCEL SERVICE 7/8/99	-4.07	16.23
7812	07-21-1999	32	COMMISSARY JULY 21, 1999	-16.15	.08
7945	08-12-1999	10	MAINTENANCE PAYROLL JULY, 1999	21.00	21.08
7990	08-19-1999	44	ORGANIZATIONAL JAYCEE PHOTO'S	-3.50	17.58
8234	08-22-1999	32	HUN COMMISSARY FOR 8/22/1999	-17.50	.08
99	09-09-1999	38	INSIDE PURCHASES XEROX COPIES-25 AUGUST 1999	-.20	-.12
113	09-10-1999	10	MAINTENANCE PAYROLL AUGUST, 1999	15.00	14.88
8259	09-16-1999	32	HUN COMMISSARY FOR 9/16/1999	-14.63	.25
			BALANCE AFTER THESE TRANSACTIONS------>		.25

PA DEPT. OF CORRECTIONS
BUREAU OF COMPUTER SERVICES
REMOTE PRINT TIME 14:22

INMATE ACCOUNTS SYSTEM
PARTIAL ACCOUNT LISTING
FROM PURGE FILE

RUN IAS365
DATE 1/28/2000
PAGE 1

INMATE NUMBER	NAME LAST	FIRST	MI	STARTING BALANCE
DK3707	HAYLE	EDWARD		.25

BATCH #	DATE MO DY YEAR		TRANSACTION DESCRIPTION	TRANSACTION AMOUNT	BALANCE AFTER TRANSACTION
322	10-13-1999	10	MAINTENANCE PAYROLL SEPTEMBER, 1999	21.00	21.25
350	10-18-1999	31	OUTSIDE PURCHASES ACCESS CATALOG	-9.29	11.96
8294	10-21-1999	32	HUN COMMISSARY FOR 10/21/1999	-11.59	.37
482	11-09-1999	10	MAINTENANCE PAYROLL OCTOBER, 1999	21.50	21.87
8314	11-10-1999	32	HUN COMMISSARY FOR 11/10/1999	-21.26	.61
570	11-22-1999	41	MEDICAL SPORTS INJURY-14 NOVEMBER 1999	-2.00	-1.39
648	12-07-1999	10	MAINTENANCE PAYROLL NOVEMBER, 1999	33.00	31.61
8343	12-09-1999	32	HUN COMMISSARY FOR 12/09/1999	-22.25	9.36
8350	12-16-1999	32	HUN COMMISSARY FOR 12/16/1999	-9.11	.25
			BALANCE AFTER THESE TRANSACTIONS------>		.25

PA DEPT. OF CORRECTIONS — INMATE ACCOUNTS SYSTEM — RUN IAS365
BUREAU OF COMPUTER SERVICES — PARTIAL ACCOUNT LISTING — DATE 1/28/2000
REMOTE PRINT TIME 14:22 — FROM ACTIVE FILE — PAGE 1

INMATE NUMBER	NAME LAST	FIRST	MI	STARTING BALANCE
DK3707	HAYLE	EDWARD		.25

BATCH #	DATE MO DY YEAR		TRANSACTION DESCRIPTION	TRANSACTION AMOUNT	BALANCE AFTER TRANSACTION
875	01-12-2000	10	MAINTENANCE PAYROLL DECEMBER, 1999	31.38	31.63
8013	01-13-2000	32	HUN COMMISSARY FOR 1/13/2000	-30.77	.86
919	01-19-2000	38	INSIDE PURCHASES XEROX COPIES-29 DECEMBER 1999	-.40	.46
			BALANCE AFTER THESE TRANSACTIONS------>		.46

No. 99-981

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October Term 1999

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

EDWARD HALYE,

Respondent,

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

Al Flora, Jr.
First Assistant Public Defender
Luzerne County Courthouse
200 North River Street
Wilkes-Barre, PA 18711
(570) 825-1754

Attorney for Respondent

REASONS FOR DENYING THE WRIT

The state courts of Pennsylvania have not decided this question of federal law in a way that conflicts with relevant decisions of this Court and other federal Circuit Courts. In E.B. Verniero, 119 F.3d 1077 (3rd Cir. 1997), the provisions of New Jersey's Megans Law that allocated the burden of proof to the defendant to prove that he was not a sexually violent predator was determined to violate procedural due process.

The conviction of a defendant of a predicate offense creates the presumption that the defendant is a sexually violent predator without proof of additional facts. 42 Pa.C.S.A. 9794 (b). As a result, Megans Law alters the maximum penalty for the offense for which the defendant was convicted to a mandatory maximum sentence of life imprisonment. 42 Pa. C.S.A. 9799.4. This statutory scheme, which is a criminal rather than civil process, does not create a sentencing enhancement but rather an alteration of a maximum sentence without proof of additional facts. Such a scheme violates procedural due process. Specht v. Patterson, 386 U.S. 605, 609-10, 87 S.Ct. 1209, 1212 (1967) (Colorado's Sex Offenders Act which allows for an indeterminate to life sentence after conviction of a predicate offense violated procedural due process); McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411 (1986) (proof of additional facts under mandatory sentencing scheme which does not alter maximum penalty only serves to enhance penalty and does not violate due process). See, Kansas v. Hendricks, ___U.S.___, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (Kansas Sexually Violent Predator Act does not violate procedural due process because, as part of a civil process, it places

the burden of proof upon the state and does not increase an offender's maximum term of imprisonment).

Respondent further maintains that the reversal of the law in this case, thus requiring the burden of persuasion to be placed upon the Commonwealth, protects citizens by insuring that its classification system is fair and accurate. The reversal of the law also protects the fundamental liberty rights of defendants by requiring an accurate and reasonable disposition of the issues before state criminal trial courts. Imposing the burden of proof upon the Commonwealth materially minimizes the risk of error in determining that a defendant is a sexually violent predator without impairing the states ability to secure a prompt determination. Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

CONCLUSION

The Petition for Writ of Certiorari should be denied.[1]

Al Flora, Jr., Esquire
First Assistant Public Defender
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(570) 825-1754

Attorney for Respondent

[1] The Petition for Writ of Certiorari should be to the Pennsylvania Supreme Court rather than the States Intermediate Appellate Court.